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Foreword

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FOREWORD

*Chief Judge Loren A. Smith**

It is important that some more convenient means should be provided, if possible, for the adjustment of claims against the Government, especially in view of their increased number by reason of the war. It is as much the duty of Government to render prompt justice against itself, in favor of citizens, as it is to administer the same between private individuals.**

Abraham Lincoln wrote these words in a practical message to Congress concerning the nature of the Claims Court's jurisdiction. This practical message, designed to deal with an immediate government problem,¹ laid the basic blueprint for our institution. That blueprint establishes a system where

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** W. Cowen, P. Nichols, Jr. and M. Bennett, *The United States Court of Claims: A History*, reprinted in 216 Ct. Cl. 1, 20-21 (1978) (quoting 62 Cong. Globe, 37th Cong., 2d Sess., App. at 2 (1862) (President Lincoln's 1861 Annual Message to Congress) (emphasis omitted)).

1. When the Court of Claims was created in 1855, it was without authority to render final judgments. President Lincoln addressed this problem in his Annual Message to Congress in 1861, which is quoted above. He also noted:

It was intended by the organization of the Court of Claims mainly to remove this branch of business from the Halls of Congress; but while the Court has proved to be an effective and valuable means of investigation, it in great degree fails to effect the object of its creation, for want of power to make its judgments final.

Id. at 21.

However, President Lincoln's address did not immediately have its desired effect. Although Congress began considering reforms of the Court of Claims, finality of judgments remained a hotly contested issue. Senator John P. Hale of New Hampshire opposed the Court of Claims reform on the basis that the court should be repealed altogether. Senator Hale succeeded instead in passing the Hale Amendment which provided that "no money shall be paid out of the Treasury for any claim passed upon by the Court of Claims till after an appropriation therefor shall be estimated by the Secretary of the Treasury." *Id.* at 23 (footnote omitted).

As a result of the Hale Amendment, the Supreme Court took the view that decisions of the Court of Claims were not final. In *Gordon v. United States*, 69 U.S. 561 (1864), the Supreme Court dismissed an appeal from the Court of Claims for want of jurisdiction because the decision was subject to review by the Secretary of the Treasury. As such, an appeal from the Court of Claims would require the rendering of a constitutionally impermissible advisory opinion.

Gordon succeeded where congressional debate had failed. Congress quickly reacted to the Supreme Court's decision by repealing the Hale Amendment, thereby mandating the finality of Court of Claims judgments and effectuating President Lincoln's intentions.

the sovereign, the United States of America, is held legally accountable for its dealings with the citizens in the same way as any citizen would be held accountable. This was foremost a system of law, rather than a system of political discretion, as used by Congress prior to 1855.

Through various changes in the structure and names of the court, the jurisdiction of the United States Claims Court has remained remarkably stable over a century and a third. It is a jurisdiction where the Federal Government may be sued as a private litigant for its alleged violations of the rights of citizens. It is both a tribute to our Congresses and Presidents, as well as to our Nation's deeply ingrained respect for legal rights, that, since 1855, the notion that government must deal with its citizens on the basis of legal equality has never been seriously questioned.

There have been long and complex lines of precedent trying to define that concept of legal equality. These have been the most important issues that the court has faced. It is not the purpose of this introduction to analytically explore any of those lines; however, it might be useful to the reader of this issue to describe several of them. This, it is hoped, will put the court's present operation in context.

Perhaps the most important issue the court has dealt with is the question of when the sovereign is acting as a sovereign and not as a participant in the legal system. To clarify this somewhat abstract idea let me use an analogy. At a baseball game one observes two teams and the umpires on the field. Each team is governed by certain rules—three strikes and you are out, for example. Each team also has a definite stake in the game: outscoring its opponent. The umpire's conduct is governed by different rules. The umpire also has no stake in which team wins.

The Federal Government's role varies from pure umpire to pure player with an infinite variety of mixed roles in between. As the enforcer of the use of certain minimum wage rates in construction, for example, it is serving as an umpire. Imposing certain rules upon various types of transactions, rules that Congress has decided are in the public good, serves no proprietary interest that uniquely benefits the government. On the other hand, when the government purchases a building from a contractor, it is acting as a player and seeking to get the best deal it can from the seller. In this capacity the government has the same interests as any other purchaser of property. It wants the best building for the cheapest price.

The court has sought over the course of its history to sort out those situations in which the government is a player from those in which it is an umpire. This has never been an easy task. However, it is an absolutely necessary task for several reasons. If the government is always viewed as

sovereign, then dealings with it always bear the risk of the vagaries of the exercise of sovereign power. This imposes potential liabilities upon any private party that are never predictable, and are arguably unfair. On the other hand, if these liabilities are always present, then private entities will always include them in their decision as to whether to do business with the government, and at what price. The result is a higher cost for doing business with the government. This will make government operations more expensive. Thus, the sorting of roles helps both the private entity and the government.

Another reason for the importance of the sorting out of roles is the problem of due process. In a free society, liberty is protected by certain procedural restraints on government action. These restraints do not apply to private entities. To the extent that they are an inherent part of constitutional government, they do not contribute to efficiency or saving money. The Framers of our Constitution were very clear on this point. Separated powers and checks and balances were designed not because they encourage efficiency and speed, but precisely for the opposite reason. They were designed to protect liberty by discouraging the use of governmental power to do things in all but certain limited areas. To the extent government subjects itself to the rules governing other players in our legal and market system, it can operate more efficiently at least in limited areas. In the case law of government contracts, takings, bid protests, and certain tax questions, this sorting of roles is at the core of what the court did one hundred years ago and is doing today.

Another theme that has run through the Claims Court's historic operation is the tension between its role as a guardian of the public fisc and its role as a guardian of the individuals' legal rights against government conduct. In procurement, pay, and tax litigation, the tension of this dual role is always present. The statutory schemes under which the court operates set before the court the clear duty and the problem: never award one cent that is really not owed by the fisc. However, if money is legally owed the court must, without qualm, award it, whether it will increase the deficit by one hundred billion dollars or only one cent. This role, where the government is always the defendant, requires a constant sensitivity and a constant intellectual effort to understand how, in a dynamic world, law and fact infinitely mix to create new puzzles.

A final problem that this court has struggled with, to perhaps a greater degree historically than most other courts, is the question of systematic rationality and uniformity. The federal tax, employment, and procurement systems are unified systems. The interpretation of a contract dispute, a tax statute, or an employment regulation may have profound effects on the abil-

ity of the government to operate. It may effect millions of other contractors, taxpayers or employees. In an era when it sometimes seems that the Federal Register and the body of statutory and case law grow faster than the GNP, the tension between the decision in an individual case and the rational result for the legal system is a major concern. The court has struggled with this concern since Congress made the decision that a national court was needed, and that a national unified jurisdiction must be exercised by truly independent judges. This was most recently illustrated by the decision to put the National Vaccine Injury Compensation Program in the Claims Court.

It is with these somewhat general thoughts on the United States Claim Court that I commend this effort of the *Catholic University Law Review* to the reader. I also thank this publication for its inaugural exploration of a profound topic that goes beyond the current existence, form and jurisdiction of this, the citizens' court.